Office-Supreme Court, U.S.
FILED
MAY 29 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1800

In the Supreme Court of the United States

OCTOBER TERM, 1980

TINO FIUMARA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the group of individuals associated in this case to commit unlawful acts for profit constituted an "enterprise" within the meaning of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* (all petitioners).

2. Whether consensual recordings of petitioners' conversations with a government informant violated the Fourth Amendment because they were obtained without a warrant (all petitioners).

3. Whether the government's electronic surveillance of petitioner Buzzanca's office violated the minimization requirements of 18 U.S.C. 2518(5) (all petitioners).

4. Whether the district court abused its discretion in denying petitioners' severance motions (all petitioners).

5. Whether petitioner Buzzanca was entitled to an entrapment instruction.

6. Whether the district court erroneously instructed the jury on the elements of the Hobbs Act, 18 U.S.C. 1951 (petitioners Fiumara and Buzzanca).

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 3

Conclusion 10

TABLE OF AUTHORITIES

Cases:

Busic v. *United States*, 446 U.S. 398 4

Katz v. *United States*, 389 U.S. 347 5

Scott v. *United States*, 436 U.S. 128 6

United States v. *Adams*, 581 F. 2d 193, cert. denied, 439 U.S. 1006 7

United States v. *Aloi*, 511 F. 2d 585, cert. denied, 423 U.S. 1015 6

United States v. *Caceres*, 440 U.S. 741 5

United States v. *Clemente*, 482 F. Supp. 102 ..... 5, 6

United States v. *Enmons*, 410 U.S. 396 9

United States v. *Fury*, 554 F. 2d 522, cert. denied, 433 U.S. 910 5

United States v. *Licursi*, 525 F. 2d 1164 7

United States v. *Nace*, 561 F. 2d 763 6

United States v. *Thomann*, 609 F. 2d 560 7

United States v. *Turkette*, No. 80-808 (argued Apr. 27, 1981) 4, 10

Page

Cases—(Continued):

United States v. *Watson*, 489 F. 2d 504 7

United States v. *White*, 401 U.S. 745 4

United States v. *Wilner*, 523 F. 2d 68 8

Constitution, statutes and rules:

United States Constitution, Fourth Amendment 4

Hobbs Act, 18 U.S.C. 1951 2

18 U.S.C. 1951(b)(2) 9

Labor-Management Relations Act ("Taft-Hartley Act"):

29 U.S.C. 186(b) 2, 7, 8

Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* 3-4

18 U.S.C. 1962(c) 1

18 U.S.C. 1962(d) 2

18 U.S.C. 2518(5) 5, 6

26 U.S.C. 7201 2

26 U.S.C. 7206(1) 2

Fed. R. Crim. P. 8(b) 6

Fed. R. Crim. P. 14 6

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1800

TINO FIUMARA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is not yet reported. The opinion of the district court denying petitioners' suppression motions is reported at 482 F. Supp. 102.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1981. The petition for a writ of certiorari was filed on April 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner Fiumara was convicted on one count of participating in an enterprise through a pattern of racketeering activity, in violation of the RICO statute, 18 U.S.C. 1962(c) (Count 1); one count of

conspiring to commit that offense, in violation of 18 U.S.C. 1962(d) (Count 2); 35 counts of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951 (Counts 14-48); 35 counts of bribery, in violation of the Labor-Management Relations Act ("Taft-Hartley Act"), 29 U.S.C. 186(b) (Counts 49-83); and two counts of evading taxes and filing false tax returns, in violation of 26 U.S.C. 7201 and 7206(1) (Counts 210 and 211). Petitioner Buzzanca was convicted on each of the above counts, except the tax counts, and on one additional count of violating the Taft-Hartley Act (Count 84). Petitioner Copolla was convicted on the RICO conspiracy count.

Petitioner Fiumara was sentenced to 20 years' imprisonment on Count 1, to be served concurrently with a sentence he is presently serving in another case; 5 years' imprisonment on Count 2, to be served consecutively to the sentence on Count 1; 20 years' imprisonment on each of Counts 14 through 48, to be served concurrently with each other and with the sentence on Count 1; 6 months' imprisonment on each of Counts 49 through 83, to be served consecutively to each other but concurrently with the sentence on Count 1; 2 1/2 years' imprisonment on each of Counts 210 and 211, to be served concurrently with each other but consecutively to the sentence on Count 2; and a total fine of $15,000. Petitioner Buzzanca was sentenced to concurrent 10-year terms of imprisonment on Counts 1, 2 and 14 through 48; 3 months' imprisonment on each of Counts 49 through 84, to be served concurrently with each other and with the sentence on Count 1; and a fine of $5,000.[1] Petitioner Copolla was sentenced to 13 years' imprisonment on the RICO conspiracy count. The court of appeals affirmed (Pet. App. 1a-34a).

---

[1]Petitioner Buzzanca was also ordered to forfeit his position as president of the International Longshoremen's Association union.

The evidence at trial is related in detail in the opinion of the court of appeals (Pet. App. 4a-13a). Briefly, it established the existence of an association of persons organized for the purpose of controlling all aspects of the New York and New Jersey waterfront business. The ringleader of the enterprise was co-defendant Michael Clemente. Petitioner Fiumara acted as the New Jersey waterfront "boss," petitioner Copolla was a personal assistant to Fiumara, and petitioner Buzzanca was president of two New York locals of the International Longshoremen's Association (ILA). Other members of the enterprise, who were co-defendants at petitioners' trial, included the presidents of two New Jersey locals of the ILA and a vice-president of a shipping company in New York (*id.* at 4a).

The foundation of the enterprise was its control of the ILA in New York and New Jersey. By threatening work stoppages, the enterprise was able to extort money from shipping companies and to influence their decisions regarding the allocation of ship-servicing contracts. Using its control over such contracts, the enterprise was likewise able to extort money from the ship-servicing companies. Only those shipping and ship-servicing companies that paid the amounts demanded and otherwise cooperated with the enterprise had their ships' cargo loaded and unloaded without interruption or obtained and retained contracts to provide their services (Pet. App. 4a).

The proof against petitioners and their co-defendants largely concerned their individual dealings with William Montella, the principal government witness, who was employed by several ship-servicing companies during the period covered by the indictment (Pet. App. 5a-13a).

ARGUMENT

1. Petitioners contend (Pet. 5-10) that the conduct for which they were charged and convicted does not fall within the Racketeer Influenced and Corrupt Organizations Act

(RICO), 18 U.S.C. 1961 *et seq.* They argue that the RICO counts in this case were based on an alleged "enterprise" consisting of an association organized for exclusively illegal ends, and that the RICO statute is applicable only to " 'legitimate business enterprises * * * [that are] preyed upon and taken over by racketeers' " (Pet. 6).

The issue whether a group of individuals associated in fact to commit unlawful acts for profit can constitute an enterprise under RICO is currently before this Court in *United States* v. *Turkette*, No. 80-808 (argued Apr. 27, 1981). Accordingly, consideration of this aspect of the petition should be deferred pending the Court's decision in *Turkette*.[2]

2. On 16 occasions from June through December 1978, William Montella met with petitioners or their co-defendants and secretly recorded the meetings (Pet. App. 5a). Petitioners contend (Pet. 11-16) that these consensual recordings violated their Fourth Amendment rights because they were made without a warrant. While acknowledging that in *United States* v. *White*, 401 U.S. 745 (1971), this Court decided that such consensual monitoring does not implicate the Fourth Amendment, petitioners question the continuing validity of *White* because it was a plurality

---

[2]We note that, as in *Turkette* (see Brief for the United States at 41-42 n.32), the illegal association in this case had a predatory effect on legitimate businesses—here, several shipping and ship-servicing firms. Unlike *Turkette*, however, petitioners' operation entailed the actual infiltration and subversion of the waterfront business through its extortion of shipping firms. As the court of appeals noted (Pet. App. 26a; footnote omitted), "the purpose of the 'enterprise' here was the establishment of a pattern of racketeering activity in a legitimate business, the waterfront industry." Accordingly, even if this Court narrowly construes the RICO statute in *Turkette*, there would remain the question whether RICO is applicable to the corruption of the legitimate waterfront industry involved in this case. That issue, if necessary to be resolved after *Turkette*, should properly be considered by the court below in the first instance. See, *e.g.*, *Busic* v. *United States*, 446 U.S. 398, 412 n.19 (1980).

opinion and because it is allegedly inconsistent with the "reasonable expectation of privacy" doctrine of *Katz* v. *United States*, 389 U.S. 347, 360 (1967). However, any doubt concerning the continuing validity of *White* was settled by this Court's opinion in *United States* v. *Caceres*, 440 U.S. 741, 750-751 (1979), in which it expressly reaffirmed that decision.

3. Petitioners additionally contend (Pet. 17-20) that the government failed to comply with the minimization requirements of 18 U.S.C. 2518(5) during court-authorized electronic surveillance of petitioner Buzzanca's office. At the outset, we note that only petitioner Buzzanca has standing to raise this claim. Petitioner Copolla had no privacy interest in Buzzanca's office and does not identify particular intercepted conversations in which he participated that were not pertinent to the investigation but were nevertheless subjected to surveillance. Petitioner Fiumara did not even participate in any of the intercepted conversations. See *United States* v. *Fury*, 554 F. 2d 552, 525-526 (2d Cir.), cert. denied, 433 US. 910 (1977). In any event, as the district court correctly held (*United States* v. *Clemente*, 482 F. Supp. 102, 108-110 (S.D.N.Y. 1979)), the statutory minimization requirement was met.

As the evidence adduced at the pretrial suppression hearing showed, the supervising prosecutor gave the monitoring agents detailed instructions with respect to minimization. The agents were told to listen to a conversation for no more than two minutes to determine if it was pertinent. Whenever it became evident that a conversation was not pertinent, monitoring was to terminate immediately.[3] The agents were

---

[3]The agents could continue to monitor beyond the two-minute period if they could not determine whether the conversation was pertinent (App. 1609). "App." refers to the joint appendix to the briefs filed in the court of appeals.

permitted to "spot monitor" thereafter by waiting one minute and then listening for up to two minutes to determine if the conversation had become pertinent. *United States* v. *Clemente, supra*, 482 F. Supp. at 108-110.

The above procedure, which the agents scrupulously followed,[4] was well within the requirements of Section 2518(5). This is especially true in view of the fact that petitioner Buzzanca was a "central member" of the "widespread criminal conspiracy" in this case, and that "[m]any conversations were ambiguous, guarded or in code" and "often took place in low tones * * * at the same time that other conversations in the office occurred or with background noise." 482 F. Supp. at 110. See *Scott* v. *United States*, 436 U.S. 128, 140-142 (1978).

4. Petitioners contend (Pet. 23-24) that the district court erred in denying them a severance pursuant to Fed. R. Crim. P. 14 because certain evidence introduced against their co-defendants was inadmissible against them. In addition, petitioner Copolla argues that he should have been tried separately because he was convicted only on the RICO conspiracy count.[5] However, it is well settled that denial of severance is not improper merely because evidence that is introduced against one defendant is not admissible against the others (see *United States* v. *Nace*, 561 F. 2d 763, 769-770 (9th Cir. 1977)), or because of "differences in degree of guilt" among the defendants. *United States* v. *Aloi*, 511 F. 2d 585, 598 (2d Cir.), cert. denied, 423 U.S. 1015 (1975).

---

[4]Nonpertinent interceptions lasting longer than two minutes constituted fewer than one percent of total interceptions (App. 308).

[5]In their "QUESTIONS PRESENTED," petitioners also challenge the joinder of defendants in this case under Fed. R. Crim. P. 8(b), but they offer no elaboration of the claim in the text of their petition. In the absence of any argument identifying the reasons for objecting to joinder of particular counts, there is no basis for granting review of this contention.

Moreover, in the instant case, the vast majority of evidence would have been admissible at separate trials of each petitioner to establish the existence and character of the RICO enterprise in which he was charged with participating. Finally, any danger of evidentiary spillover was largely minimized by the district court's instruction to the jury to consider each count of the indictment and the evidence against each defendant separately (Tr. 12539-12540).[6] Petitioners, in short, have failed to meet their "heavy burden" of demonstrating that they were entitled to a severance. See *United States* v. *Thomann*, 609 F. 2d 560, 564 (1st Cir. 1979); *United States* v. *Adams*, 581 F. 2d 193, 198 (9th Cir.), cert. denied, 439 U.S. 1006 (1978).

5. Petitioner Buzzanca contends (Pet. 20-23) that he was entitled to an entrapment instruction on Count 84, which charged him with accepting $1,000 from a representative of Quin Marine Services (Montella) on December 12, 1978, in violation of 29 U.S.C. 186(b). We note at the outset that reversal of Buzzanca's conviction and three month sentence on this count, which was concurrent with longer sentences on other counts, could not possibly affect the length of his imprisonment or have other significant collateral consequences. In any event, this claim is without merit.

A defendant is entitled to an entrapment instruction only if there is evidence that the government induced him to commit the offense and he introduces some evidence negating the government's proof of his propensity to commit the crime. *United States* v. *Licursi*, 525 F. 2d 1164, 1168-1169 (2d Cir. 1975); *United States* v. *Watson*, 489 F. 2d 504, 508-509 (3d Cir. 1973). Here there was no significant evidence that Montella induced Buzzanca to take the December 12 payment. The statement on which Buzzanca chiefly relies—

---

[6]That the jury did so was demonstrated by its inability to reach a verdict on five counts (Counts 1, 36, 43, 71, and 78), including the substantive RICO count, against petitioner Copolla.

Montella's statement "I'm forcing this on you" (GX 414; App. 6384)—was made some five minutes *after* Buzzanca had taken the money and placed it in his pocket (App. 6381; Tr. 7248-7249).

Furthermore, even assuming there was sufficient evidence of inducement to require the government to come forward with evidence of predisposition to commit the offense, the government met that burden with evidence that Buzzanca did not in any way negate. Buzzanca had become a member of the RICO enterprise no later than December 1975, when he promised Clemente that he would replace co-defendant Carol Gardner and Vincent Colucci in collecting certain illegal labor and extortion payments from Montella (Pet. App. 9a-10a). From that time until December 1978, Buzzanca accepted $2,000 in cash from Montella almost every month (*id.* at 10a-11a). In addition, he received $500 from Montella in 1977 for his efforts to obtain additional business for Quinn Lumber, a ship-servicing company for which Montella was general manager (Tr. 3592-3593, 3609). Having violated 29 U.S.C. 186(b) on more than 30 prior occasions, Buzzanca cannot be heard to complain that Montella improperly induced him to violate the statute again by accepting $1,000 on December 12.

Buzzanca argues (Pet. 22), however, that his other Taft-Hartley offenses do not establish predisposition because on those occasions he acted as an agent for others and did not, as on December 12, accept the money for himself. The short answer is that his acceptance of money for an employer was no less a violation of the Taft-Hartley Act than an acceptance for himself, and it is no less an indication that he was predisposed to accept the $1,000 payment on December 12. On this record, there was simply no basis for the giving of an entrapment instruction. See *United States* v. *Wilner*, 523 F. 2d 68, 74 (2d Cir. 1975).

6. Extortion, as defined in the Hobbs Act, 18 U.S.C. 1951(b)(2), consists of the use of wrongful means to achieve a wrongful objective. See *United States* v. *Enmons*, 410 U.S. 396 (1973). Petitioners Fiumara and Buzzanca contend (Pet. 24-27) that the district court erroneously instructed the jury that it could convict them under the Hobbs Act solely upon finding that they used fear of economic loss to obtain money, arguing that use of such fear is routine in legitimate business transactions and not wrongful in itself. The court of appeals properly rejected this claim.

While we agree that the use of fear of financial injury is not inherently wrongful, the district court expressly advised the jury that in order to convict it must find beyond a reasonable doubt that property to which the petitioners *"had no lawful right* * * * was obtained because of the victim's fear of economic loss" (Tr. 12576; emphasis added). It further instructed that "a union official or anyone else cannot threaten economic injury or arouse fear *for a non-legitimate purpose* * * *" and that the jury should convict if it found that "threats were made or that fear was reasonably aroused, and * * * that the purpose of the defendant * * * was to obtain money for himself or others *to which they were not entitled*" (Tr. 12578; emphasis added). Accordingly, it is simply not true that the jury was permitted to convict petitioners for extortion based solely on a finding that they used fear of economic loss to obtain money. Rather, the jury was required to find that such inducement of fear was wrongful because it was employed for an illegitimate purpose.[7]

---

[7]In any event, we note that the court's extortion charge more than satisfied the instructions requested by petitioners. Petitioner Buzzanca's proposed instruction made only brief mention of the "wrongfulness" requirement (App. 1274-1277), and petitioners Fiumara and Copolla did not even include the requirement in their requests (App. 1302-1303).

Nor was the charge improper because its definition of extortion would embrace a broad spectrum of legitimate business transactions (Pet. 26-27). In particular, petitioners object to the district court's statement that "any company or individual has the right to obtain business from another company or individual without making payments to a third party" (Tr. 12577). When read in context, however, it is obvious that the court was referring to third-party extortion payments and not to legitimate business transactions. Indeed, the jury was unequivocally instructed (Pet. App. 18a) that the Hobbs Act "does not prohibit any person from using his position of power or influence to obtain legitimate economic ends." In short, the instruction insured that the jury would distinguish between the legitimate and the illegitimate use of economic fear.

CONCLUSION

The petition should be held pending the decision in *Turkette*, and the RICO "enterprise" issue should be disposed of in light of that decision. In all other respects, the petition should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

MAY 1981

DOJ-1981-05